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MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING


THE MARYLAND-NATIONAL CAPITAL  
PARK AND PLANNING COMMISSION

8787 Georgia Avenue  
Silver Spring, Maryland 20910-3760

September 22, 2005

MEMORANDUM

TO: Karen Orlansky, Director  
Office of Legislative Oversight

FR: Charles R. Loehr, Director   
Montgomery County Department of Park and Planning

RE: Responses to Certain Legal Issues Related to OLO's Clarksburg  
Town Center Fact-Finding Review

Attached please find the Commission's response to Questions 4 and 8 as set forth in your Memorandum to me dated August 1, 2005. This transmittal completes the responses to your inquiry.

Attachment

Cc: Adrian R. Gardner, General Counsel  
Michele Rosenfeld, Associate General Counsel

**Response to Question 4**  
**Legal Issues Related to OLO's Clarksburg Town Center**  
**Fact-Finding Review**

4. **Documents.** The land use planning, development approval, and permitting process produces many documents, such as an approved master plan, planning board opinions, and certified plans or drawings. Provide a list of these products and for each one, address which are guidelines and which have the force of law, (e.g. the text and illustrations in an approved master plan are guidelines). How would you categorize the information in a planning staff report, or the conditions in an approved project plan, preliminary plan, or site plan?

**Response:** The following are a list of documents that are generated in connection with the land use planning, development approval, and permitting process<sup>1</sup>:

1. Master Plan (§33A-10<sup>2</sup>)
2. Zoning application with plans<sup>3</sup> (Division 59-H-2)
3. Planning Staff report and recommendation on zoning application (prepared for Planning Board hearing on zoning application)
4. Planning Board recommendation on zoning application (Division 59-H-3)
5. Zoning Hearing Examiner's report and recommendation on zoning application (Division 59-H-5)
6. District Council's resolution on zoning application (§ 59-H-8.3)
7. Project Plan application with plans (§ 59-D-2.1)
8. Planning Staff report and recommendation on project plan application (§ 59-D-2.3)
9. Planning Board Opinion on project plan application (§ 59-D-2.4 et. seq.)
10. Preliminary Plan application (§ 50-34)
11. Planning Staff report and recommendation on preliminary plan application (prepared for Planning Board hearing on preliminary plan application – § 50-35(f))
12. Planning Board Opinion on preliminary plan application (§§ 50-35(f) and 50-35(h))
13. Site Plan application (§§ 59-D-3.1 and 59-D-3.2 et. seq.)
14. Planning Staff report and recommendation on site plan application (prepared for Planning Board hearing on site plan application)

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<sup>1</sup> This list is illustrative only. Some developments may generate or involve all of these documents; most will only generate or involve some of these documents.

<sup>2</sup> All citations are to the Montgomery County Code unless otherwise noted.

<sup>3</sup> Certain zoning applications require the approval of a Development Plan in accordance with Division 59-D-1.

15. Planning Board Opinion on site plan application (§ 59-D-3.4)
16. Signature Set of site plan (§59-D-3.8)
17. Record Plat (§ 50-8)
18. Building permit application (§ 8-24)
19. Building permit (§ 8-25)

The documents that are binding on an applicant are those that are generated by the agency or Staff with the ultimate authority to approve the plans. These include District Council resolutions on zoning applications; Planning Board Opinions on project plan, preliminary plan, and site plan applications; signature sets; record plats; and building permits. Thus, applicant submittals such as plan applications are not binding<sup>4</sup> and neither are Staff reports and recommendations.<sup>5</sup>

Master plans are not approved as part of the development process but are approved as a part of the planning process. Master plans are not binding in and of themselves; however, compliance with a master plan may be required as part of the regulatory review process. For instance, when reviewing a preliminary plan approval, the Planning Board must find that a preliminary plan “substantial conform[s] to the applicable master plan, sector plan, or urban renewal plan, including maps and text, unless the Planning Board finds that events have occurred to render the relevant master plan, sector plan, or urban renewal plan recommendation no longer appropriate.” § 50-35(l). The Planning Board’s finding on substantial conformance with the master plan is binding on the applicant; the actual master plan itself is not.

Information in the staff report is not binding on the applicant. It is, rather, the basis for the staff’s recommendation to the Planning Board. The Planning Board may adopt portions of the staff report, which become binding on the applicant through the Planning Board’s opinion; however, the staff report itself is not binding on the applicant.

The Planning Board’s Opinion and the subsequent signature set are binding on the applicant. The Board’s opinion establishes the “envelope” of the approval (e.g., density, height, setbacks, green space and recreational facility requirements). After the Planning Board’s Opinion is mailed, the Applicant then must submit a signed set of site plan drawings (“signature set,” or “site plan”). The Zoning Ordinance establishes the signature set as a legally binding document. (“Upon approval, the site

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<sup>4</sup> While elements of the applicant’s application may be binding through adoption by the Planning Board, District Council, or Staff in their ultimate approvals, it is the approvals that bind the applicant, not the application itself.

<sup>5</sup> As with plan applications, there may be elements of a staff report that is binding because they are adopted or incorporated into the plan approval, but the approval itself binds the applicant and not the staff report.

plan must be . . . Signed by the applicant agreeing to execute all the features and requirements that are part of the site plan . . . " § 59-D-3.4(c). The Applicant can submit a signature set with features that are more restrictive than established by the Board (e.g., lower heights, greater setbacks). The development standards as submitted in the signature set then are binding on the Applicant. If an Applicant has an approved signature set with more restrictive development standards than the Board originally approved, and wants to build to the Board-approved maximum development standards, then the Applicant must submit a revised signature set for staff approval.

### **Question 8. Triggers.**

How do State and County law, regulations, and governing documents define the triggers that govern the sequence of government approvals in the development process? Which agency administers each of these triggers, and what does this process require in terms of coordinating signoffs and approvals?

### **Response**

The final step in the development process in Montgomery County is the procurement of a building permit from the Montgomery County Department of Permitting Services ("DPS") and, subsequently, a certificate of use and occupancy or final inspection, as applicable. Generally, a property owner can only get a building permit for a dwelling or other structure that will be constructed on a lot or parcel shown on a plat recorded among the land records of Montgomery County.<sup>1</sup> Montgomery County Code § 50-20(a). (Hereinafter, references to the Montgomery County Code shall be "Code"). As such, absent such delineation on a record plat, a property owner must obtain certain government approvals.<sup>2</sup>

The development approval process begins with the subdivision of the property in question (which process is governed by the provisions of Code Chapter 50) and requires approval of a preliminary plan. See Code § 50-34(a) ("Every proposed subdivision or resubdivision shall be submitted to the [Planning Board] for tentative or conditional approval in the form of a preliminary plan prior to the submission of a subdivision record plat.")<sup>3</sup> The process entailed in the Planning Board's review of preliminary plans has been set forth in detail in response to OLO Question No. 1. An approved preliminary plan will remain valid for 36 months from the initiation date.<sup>4</sup> Code § 50-35(h)(2)a. In order to avoid

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<sup>1</sup> There are exceptions to this requirement. For example, building permits may be approved for structures or dwellings on a farm strictly for agricultural use that are not located on a recorded lot or parcel. Code § 50-20(a).

<sup>2</sup> See Code § 50-8 (providing that, "before any development or construction of any building takes place within a subdivision or any part thereof, the subdivider thereof . . . shall file . . . a plat of the proposed subdivision with the [Planning Board] for its approval and the approved record plat shall be recorded in the land records of the county . . .").

<sup>3</sup> In certain instances, the submission of a preliminary plan is not required to subdivide a property. Code § 50-35A (Minor Subdivisions—Approval Procedure) sets forth the circumstances under which a preliminary plan is not required to subdivide a property.

<sup>4</sup> The initiation date for commencing the period during which time a preliminary plan must be validated is generally defined as being the later of 30 days from the mailing date of the Board's opinion or the date of final court action, in the event an administrative appeal is noted. Code § 50-35(h)(1). Preliminary plans for multi-phased projects can

expiration of the Board's preliminary plan approval, an applicant "must have secured all governmental approvals necessary as condition precedent for plat recordation and a final record plat . . . has been recorded among the Montgomery County Land Records." Id. In the event a preliminary plan expires, the Board's action is extinguished and a developer seeking to pursue development must submit a new preliminary plan application and obtain new Planning Board approval.

Whether additional regulatory Planning Board approvals—beyond preliminary plan approval—are required prior to record plat approval depends, as discussed below, upon the zone in which the subject property is located and, if applicable, the chosen method of development—that is, standard or optional method.

A developer seeking to construct a new development in the RMX-2 Zone has the option of developing under either the standard or the optional method of development. Under the standard method, if the property is not a recorded lot, the developer need only obtain preliminary plan approval from the Planning Board (and record plat approval by the requisite agencies) before obtaining a building permit. Code § 59-C-10.2 (Methods of development-1. Standard method of development); Code § 59-C-10.2.1 (Standard method of development regulations). The "Introduction" to Code art. 59-D provides a reference table stating, for the standard method of development in the RMX-2 Zone, that project plan approval is not required and site plan approval is only required if optional regulations for moderately priced dwelling units are used.

In contrast, should a developer opt to proceed under the optional method of development for new development in the RMX-2 Zone, the Zoning Ordinance expressly requires that both project and site plan approval be obtained (and record plat approval by the requisite agencies) before obtaining a building permit. See Code § 59-C-10.2.2 (providing that "a project plan and site plan must be approved by the Planning Board."); see also Code § 59-D-2.11 ("[T]he developer is required to submit a project plan as a part of the application for the use of the optional method; and a site plan must be approved in accordance with the requirements of division 59-D-3 prior to the issuance of any building permit."). The Reference Table also sets forth an express requirement for both project and site plan review in such cases.

The Planning Board reviews and approves project plans. Code § 59-D-2.4 (Action by planning board). Division 59-D-2 of the Zoning Ordinance governs project plan review and that process has been previously discussed in detail in response to OLO Question No. 1. An approved project plan will remain valid for up to 24 months from the initiation date. Code § 59-D-2.7(b). Generally, site

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remain valid for a longer period than single-phased projects; the length of the validity period for each phase (no greater than 36 months from the initiation date of such phase) being set forth in a phasing schedule approved by the Board. Code § 50-35(h)(2)b.

plan approval within this period will prevent a project plan from expiring. Id. Failure to obtain site plan approval—or the filing of an extension request—before the validity period expires will result in the expiration of the project plan. Code § 59-D-2.7(b),(c). If a project plan expires, the Board's action is extinguished and a developer seeking to pursue development must submit a new project plan application and obtain new Planning Board approval.

The Planning Board reviews and approves site plans, which, if required, is the final step in the Planning Board's review of a development proposal prior to its review and approval of a record plat. Code § 59-D-3.4 (Action by Planning Board). The process entailed in the review of a site plan is contained within Division 59-D-3 of the Zoning Ordinance and has been set forth in detail in response to OLO Question No. 1. The validity of an approved site plan "is conditionally tied to the expiration date of the underlying approved preliminary plan." Code § 59-D-3.8 (Validity). As such, the recordation of a record plat serves to validate a site plan. In the event a site plan expires, the Board's action is extinguished and a developer seeking to pursue development must submit a new site plan application and obtain new Planning Board approval. See generally id.

The review and approval of a record plat is the final step in the Planning Board's regulatory approval of a development proposal. The Board's review and approval of such plats is governed by the process set forth in Code Chapter 50. A record plat must comply with an approved preliminary plan; however, minor modifications in the plan are permitted if, in the Board's view, they do not alter the intent of the preliminary plan approval. Code § 50-37(b)(1). The Zoning Ordinance provides that "[i]n the case of any land in a zone requiring site plan approval . . . a record plat . . . must not be approved unless it is in strict compliance with a site plan . . . ." <sup>5</sup> Code § 59-D-3.5. Following the Board's approval of a record plat, its authorized officers must sign it. Code § 50-37(f)(1). DPS must also sign the approved record plat prior to final processing of the plat. Code § 50-37(f)(2). After all required signatories have signed the plat, Planning Board Staff must transmit a reproduction of the approved and signed record plat to the clerk of the circuit court for recordation. Code § 50-37(f)(5).

As is stated above, DPS may approve a building permit following recordation of the plat. The trigger for DPS's review of a building permit is the filing of an application, which is governed by Code § 8-24 (Application for permit). Among the required submissions that accompany an application for building permit is "a plot plan drawn to scale showing . . . [t]he location, dimensions and proposed use of buildings . . . for which a permit is requested . . . ." Code § 8-24(f)(4). The Director of DPS, or his or her designee, must sign each permit

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<sup>5</sup> Note, however, Code § 50-37(b)(2), which states that "[i]n those situations where a site plan is required, the Board may refuse to approve a final (record) plat until a site plan is approved . . . ." (emphasis added).

issued. Code § 8-25(d). The Director is also required to stamp "approved" on sets of submitted plans. Code § 8-25(e). Much of the Planning Board's response to OLO Question No. 1, is responsive to Question No. 8; and, therefore, select portions of that response are repeated below.

The Maryland Annotated Code of 1957, Article 28, § 8-119(a) states, in pertinent part, as follows:

A building or other structure may not be erected or structurally altered in the regional district<sup>6</sup> without the issuance of a building permit, and a permit may not be given except in conformity with the provisions of this article and of the regulations enacted by the respective district councils.<sup>7</sup>

\* \* \* \*

In any part of the regional district in which there does not now exist provision of law or ordinance designating an administrative official by whom building permits are to be issued, the appropriate district council shall designate this official. An act, ordinance, or regulation issued under the authority of this article does not require the approval by the Commission of any building permit in Montgomery County or Prince George's County, and any acts, ordinances, or regulations inconsistent herewith are repealed to the extent of the inconsistency. However, in Montgomery County, all building permit applications shall be referred to the Commission for review and recommendations as to zoning requirements.

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In Montgomery County, the district council, by enactment of an act, ordinance, or regulation, is required to designate an official who issues building permits. Moreover, the issuance of a building permit does not require the approval by the Commission and, in fact, any act, ordinance, or regulation that requires the Commission's approval for the issuance of a building permit is expressly repealed to the extent that it requires Commission approval. However,

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<sup>6</sup> The "regional district" is defined in Article 28 as "The area in Montgomery and Prince George's Counties within the boundaries specified in this title . . . ." Art. 28, §7-102. Section 7-103 defines the "regional district" in Montgomery County as "The entire area of Montgomery County . . . subject to the provisions of § 7-105 of this title." Section 7-105 excludes certain municipal corporations from the regional district. Clarksburg falls within the regional district.

<sup>7</sup> Article 28, § 8-101 states, in pertinent part, that "The County Councils of Montgomery County and Prince George's County are each individually designated, for the purpose of this article, as the district council for that portion of the regional district lying within each county respectively."



Article 28 does require that all building permit regulations be referred to the Commission for review and recommendations as to zoning requirements.

Pursuant to Article 28, § 8-119, the Montgomery County District Council enacted a regulation designating an official to be in charge of issuing building permits. Section 8-25 of the Montgomery County Code ("Code") expressly designates the Director of DPS as that official. Section 8-25(a) expressly states, in pertinent part, that

The Director<sup>8</sup> must examine or cause to be examined each application for a building permit or an amendment to a permit within a reasonable time after the application is filed. If the application or the plans do not conform to all requirements of this Chapter, the Director must reject the application in writing and specify the reasons for rejecting it. If the proposed work conforms to all requirements of this Chapter and all other applicable laws and regulations, the Director must issue a permit for the work as soon as practicable.

Article 28, § 8-119 of the State Code and § 8-25 of the County Code designate the Director of DPS as the official with ultimate authority to issue the building permit.

To aid the Director in determining whether to issue a building permit, § 59-D-3.4(c) requires that each site plan must be

- (1) Signed by the applicant agreeing to execute all the features and requirements that are part of the site plan;
- (2) Signed by the chairman of the Planning Board, or his designee, certifying Planning Board approval of the site plan; and
- (3) Forwarded to the Department<sup>9</sup> for reference in issuing building permits under Section 59-D-3.5.

The Director of DPS must reject a permit application if it does not conform to all requirements of Code Chapter 8. Code § 8-25(a) (Action on application). Among the requirements of Code Chapter 8 is that the subject "building or structure must comply with all applicable zoning regulations, including all conditions and development standards attached to a site plan approved under Chapter 59." Code § 8-26(g). As such, DPS is statutorily required to reject a building permit application that does not comply with all development standards associated with a Planning Board site plan approval.

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<sup>8</sup> Section 8-2 of the Code defines the "Director," as used in Chapter 8 of the Code, as the Director of the Department of Permitting Services. Section 8-25(d) of the Code requires that "The director or his authorized representative shall attach his signature to each permit issued."

<sup>9</sup> "Department" is defined in § 59-A-2.1 as "The Department of Permitting Services."

Code Chapter 8 does not require that the Planning Board conduct any post permit approval inspections of a site or building that is the subject of a building permit approval. The Code does, however, provide that, following permit approval, DPS may examine or inspect a building during and upon completion of construction. Code § 8-17(a). The Director of DPS must maintain a record of, among other things, all violations of Chapter 8, which, as stated above, includes development standards associated with a Planning Board site plan approval. Id. Before issuance of a certificate of use and occupancy, DPS must perform a final inspection and "all violations of the approved plans and permit shall be noted and the holder of the permit shall be notified of the violations." Code § 8-17(e). Among other documents, a copy of the site plan must be "kept on the site of operations open to inspection by [DPS], fire or police officials, in the course of their duties, during the entire time the work is in progress and until its completion." Code § 8-25(g).